In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1734

W. M. GURLEY, d/b/a GURLEY OIL COMPANY,
Petitioner,

vs.

ARNY RHODEN, COMMISSIONER, CHAIRMAN OF THE STATE TAX COMMISSION FOR THE STATE OF MISSISSIPPI,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

BRIEF FOR THE PETITIONER

WALTER P. ARMSTRONG, JR.
HUBERT A. McBRIDE
19th Floor Commerce Tower
One Commerce Square
Memphis, Tennessee 38103

CHARLES R. DAVIS
THOMAS W. TARDY, III
507 First National Bank Building
Post Office Drawer 1532
Jackson, Mississippi 39205
Counsel for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-8030

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Mississippi, reported in 288 So.2d 868 (Miss. 1974), is attached to the petition for a writ of certiorari as Appendix A. The opinion of the Chancery Court of the First Judicial District of Hinds County, Mississippi, is attached to the petition for a writ of certiorari as Appendix B.

JURISDICTION

The opinion of the Supreme Court of the State of Mississippi was rendered on January 28, 1974; timely petition for rehearing was denied on February 18, 1974. The petition for a writ of certiorari was filed on May 20, 1974 and was granted on November 18, 1974. The jurisdiction of this Court rests on 28 *U.S.C.*, § 1257(3).

QUESTIONS PRESENTED

1. Whether 26 *U.S.C.*, § 4081 imposes a federal excise tax on gasoline upon the seller, in the nature of a "privilege tax", or upon the buyer consumer, in the nature of a "use tax", the latter of which would prevent a state from including such tax within its sales tax base, such tax having been merely collected by the gasoline dealer and held by him for the federal government.

2. Whether the imposition of a state sales tax on federal excise taxes collected and held by a gasoline dealer for the Federal Government is violative of (a) the due process and equal protection clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States; and (b) the Federal Government's constitutional immunity from taxation by a state.

3. Whether the imposition of Mississippi sales tax on Mississippi gasoline excise taxes collected and held by a gasoline dealer results in a deprivation of the gasoline dealer's property without due process of law under the Fifth and Fourteenth Amendments to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional Provisions:

1. The pertinent provisions of the Fifth Amendment to the United States Constitution are:

> "No person shall . . . be deprived of life, liberty or property, without due process of law; . . ."

2. The pertinent provisions of the Fourteenth Amendment to the United States Constitution are:

> "No state shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."

Statutory Provisions:

1. Title 28, *U.S.C.*, § 1257, provides in part as follows:

> "(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

2. Title 26, *U.S.C.*, § 4081, provides in part as follows:

> "(a) In General—There is imposed on gasoline sold by the producer or importer thereof, or by any producer of gasoline, a tax of 4 cents a gallon."

3. Title 26, *U.S.C.*, § 4082, provides in part as follows:

"(a) Producer—As used in this subpart, the term 'producer' includes a refiner, compounder, blender, or wholesale distributor, and a dealer selling gasoline exclusively to producers of gasoline, as well as a producer. Any person to whom gasoline is sold tax free under this subpart shall be considered the producer of such gasoline."

4. Title 26, *U.S.C.*, § 4083, provides as follows:

"Exemption of sales to producer—Under regulations prescribed by the Secretary or his delegate the tax imposed by section 4081 shall not apply in the case of sales of gasoline to a producer of gasoline."

5. Title 26, *U.S.C.*, § 6420(a) provides in part as follows:

"Gasoline—Except as provided in subsection (h), if gasoline is used on a farm for farming purposes, the Secretary or his delegate shall pay (without interest) to the ultimate purchaser of such gasoline the amount determined by multiplying—

"(1) the number of gallons so used, by

"(2) the rate of tax on gasoline under section 4081 which applied on the date he purchased such gasoline."

6. Title 26, *U.S.C.*, § 6421 provides in part as follows:

"(a) Nonhighway uses.—Except as provided in subsection (i), if gasoline is used otherwise than as a fuel in a highway vehicle (1) which (at the time of such use) is registered, or is required to be registered, for highway use under the laws of any state or foreign country, or (2) which, in the case of a highway vehicle owned by the United States, is used on the highway,

the Secretary or his delegate shall pay (without interest) to the ultimate purchaser of such gasoline an amount equal to 1 cent for each gallon of gasoline so used on which tax was paid at the rate of 3 cents a gallon and 2 cents for each gallon of gasoline so used on which tax was paid at the rate of 4 cents a gallon. . . .

"(b) Local transit systems.—

"(1) Allowance.—Except as provided in subsection (i), if gasoline is used during any calendar quarter in vehicles while engaged in furnishing scheduled common carrier public passenger land transportation service along regular routes, the Secretary or his delegate shall, subject to the provisions of paragraph (2), pay (without interest) to the ultimate purchaser of such gasoline the amount determined by multiplying—

"(A) 1 cent for each gallon of gasoline so used on which tax was paid at the rate of 3 cents a gallon and 2 cents for each gallon of gasoline so used on which tax was paid at the rate of 4 cents a gallon, by

"(B) the percentage which the ultimate purchaser's commuter fare revenue derived from such scheduled service during such quarter was of his total passenger fare revenue derived from such scheduled service during such quarter. . ."

7. Act of June 8, 1966, Ch. 645, § 6, (1966) Gen. Laws Miss. 1343 provides in part as follows:

"Any person engaged in business as a distributor, or who acts as a distributor as defined in this act, shall pay for the privilege of engaging in such business or acting as such distributor an excise tax equal to and computed as follows:

"(a) Seven cents (7¢) per gallon on all gasoline stored, sold, distributed, manufactured, refined, distilled, blended, or compounded in this State or received in this State for sale, use on the highways, storage, distribution, use in internal combustion engines, or for any purpose. . . .

* * *

"Provided that the tax herein imposed and assessed shall be collected and paid to the State of Mississippi but once in respect to any gasoline . . .

* * *

"Provided that the tax levied by this section may be passed on to the ultimate consumer, and such consumer in ascertaining his net income for income tax purposes may deduct any such taxes he has actually paid, upon proof satisfactory to the Income Tax Commissioner, during the year, from his gross income, provided the total deductions shall not exceed in any one (1) year ten per cent (10%) of the person's net income, and such tax shall be collected in the same manner as heretofore."

8. MISS. CODE ANN. § 27-55-3 (1972), provides in part as follows:

"It is declared to be the purpose and intention of the legislature to impose an excise tax to provide highways, streets and roads, on all persons engaged in the business as a distributor of gasoline in this state, computed at the rate stated herein, subject to the exemptions and refunds herein set forth. . ."

9. MISS. CODE ANN., § 27-55-5 (1972), provides in part as follows:

"(c) 'Distributor of gasoline' shall mean: (1) any person who shall sell or distribute gasoline for

resale or use, or (2) any person importing, receiving, purchasing, acquiring, using, storing, or selling any gasoline in this state on which the gasoline excise tax hereinafter imposed by this article has not been paid or the payment of which is not covered by the bond of a qualified Mississippi distributor of gasoline. All refiners, processors, marine terminal operators, or pipeline terminal operators shall qualify as distributors of gasoline as provided in this article.

* * *

"(j) The term 'for nonhighway purposes,' as used in this article, shall be construed to mean gasoline used for any other purpose than agricultural, maritime, industrial, manufacturing or domestic purposes, and no part of which is used for operating motor vehicles or motor-propelled machines of any description along the public roads, streets, alleys or highways (as defined in this article) of this state."

10. MISS. CODE ANN., § 27-55-7 (1972), provides in part as follows:

"Before any person shall engage in business as a distributor of gasoline in this state, he shall first make application to the comptroller, upon forms prescribed by the comptroller, for a permit to engage in said business. . . ."

11. MISS. CODE ANN., § 27-55-11 (1972), provides in part as follows:

"Any person in business as a distributor of gasoline, or who acts as a distributor of gasoline, as defined in this article, shall pay for the privilege of engaging in such business or acting as such distributor an excise tax equal to eight cents per gallon on all gasoline stored, sold, distributed, manufactured, refined, dis-

tilled, blended, or compounded in this state or received in this state for sale, use on the highways, storage, distribution, or for any purpose.

* * *

"Provided that the tax herein imposed and assessed shall be collected and paid to the State of Mississippi but once in respect to any gasoline. . . .

* * *

"With respect to distributors or other persons who bring, ship, have transported, or have brought into this state gasoline by means other than through a common carrier, the tax accrues and the tax liability attaches on the distributor or other person for each gallon of gasoline brought into the state at the time when and at the point where such gasoline is brought into the state."

12. MISS. CODE ANN., § 27-55-13 (1972), provides in part as follows:

"For the purpose of determining the amount of his liability for the tax imposed by this article each bonded distributor of gasoline shall, not later than the 20th day of the month next following the month in which this article becomes effective, and not later than the 20th day of each month thereafter, file with the comptroller a monthly report which shall include a statement of the number of gallons of gasoline received by such distributor within this state during the preceding calendar month, and such other information as may be reasonably necessary for the proper administration of this article.

"At the time of filing each monthly report with the comptroller, each distributor of gasoline shall pay to the comptroller the full amount of the gasoline tax

due from such distributor for the preceding calendar month less two per cent to cover evaporation, shrinkage and other normal losses. . . ."

13. MISS. CODE ANN., § 27-55-19 (1972), provides in part as follows:

"There shall not be included in the measure of the tax levied hereunder, any gasoline:

"(a) Sold or delivered by a bonded distributor of gasoline to a second bonded distributor of gasoline within this state, but nothing in this exclusion shall exempt the second bonded distributor of gasoline from paying the tax, unless the second bonded distributor of gasoline sells or delivers said gasoline to a third bonded distributor of gasoline in which event the third bonded distributor of gasoline shall be liable for the tax. . . ."

14. MISS. CODE ANN., § 27-55-23 (1972), provides in part as follows:

"Any person who shall purchase and use gasoline for agricultural, maritime, industrial, or domestic purposes, as defined in this article, which is not used in operating motor vehicles upon the highways of this state, shall be entitled to a refund of all but one cent per gallon of the tax actually paid on gasoline which is used for agricultural, maritime, industrial, domestic, or nonhighway purposes, as herein defined, provided that no such refund shall be payable unless the provisions of this article are complied with. . . ."

15. MISS. CODE ANN., § 27-55-27 (1972), provides in part as follows:

"When gasoline is lost or destroyed in quantities of seven hundred fifty gallons or more through ex-

plosion, fire, collision, storage tank wreckage, wreckage of loading or unloading facilities, such as pumps and lines, or acts of Providence while in storage in this state or while being transported in this state, the owner of such gasoline shall be entitled to tax credit or refund of the tax paid thereon. . . ."

16. MISS. CODE ANN., § 27-65-13 (1972), provides as follows:

"There is hereby levied and assessed, and shall be collected, privilege taxes for the privilege of engaging or continuing in business or doing business within this state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be, as provided in the following sections.

17. MISS. CODE ANN., § 27-65-17 (1972), provides in part as follows:

"Upon every person engaging or continuing within this state in the business of selling any tangible personal property whatsoever, there is hereby levied, assessed and shall be collected a tax equal to five per cent of the gross proceeds of the retail sales of the business, except as otherwise provided herein. . . ."

18. MISS. CODE ANN. § 27-65-3(g) (1972), provides as follows:

" 'Gross proceeds of sales' means the value proceeding or accruing from the full sale price of tangible personal property including installation charges, carrying charges, or any other additions to selling price on account of deferred payments by purchaser, without any deductions for freight, cost of property sold, other expenses or losses, or taxes of any kind except those expressly exempt by section 27-65-29, Mississippi Code of 1972. . . ."

STATEMENT

Petitioner, W. M. Gurley, d/b/a Gurley Oil Company, operates as a sole proprietorship with his office and principal place of business located in West Memphis, Arkansas. Gurley owns and operates five (5) gasoline stations in Mississippi and sells gasoline on a consignment basis to four (4) other Mississippi stations. However, the consignment sales are not in issue on this appeal [App. 41-42).

Mr. Gurley purchases the gasoline and diesel fuel that is sold in his retail stations in Mississippi from sources of supply in Tennessee and Arkansas [App. 42-43]. No federal or state excise tax is paid on the gasoline at the time of its purchase. Mr. Gurley is not a wholesaler or a distributor, but Gurley Oil Company is a retailer of gasoline and diesel fuel. Said gasoline and diesel fuel are transported in Gurley's own trucks directly to his retail outlets in Mississippi, where sales are made to the ultimate consumer with no distribution or wholesale step being involved, thereby eliminating the middle man, and, consequently, placing Gurley's stations on a competitive basis with those supplied by the major oil companies. Gurley Oil Company is not a manufacturer of gasoline or diesel fuel [App. 42-43, 48, 58].

The federal excise tax on the sale of gasoline is collected from the consumer and remitted twice monthly to a Federal depository, based on the number of gallons sold in the time period involved [App. 46-49].

The Mississippi excise tax on gasoline is collected from the consumer and remitted on a monthly basis, also calculated by a charge per number of gallons sold [App. 48-50].

A.

Computation by Gurley of Mississippi Sales Tax on Retail Sales of Gasoline.

The Mississippi Sales Tax Law [MISS. CODE ANN., §§ 27-65-1 to 95 (1972)][1] imposes a tax equal to five per cent (5%) of the gross proceeds of the retail sales of any business within the State of Mississippi selling any tangible personal property whatsoever.

The Mississippi sales tax on the retail sale of gasoline by Gurley Oil Company at the Mississippi retail service station is computed by Gurley in the following manner:

Gas purchase price from Tennessee and Arkansas sources of supply .....14¢ per gal.

Gross proceeds of retail sale to ultimate consumer .....20¢ per gal.

Mississippi sales tax collected from consumer (5% on 20¢) .....01¢ per gal.

Total gross proceeds of sale plus 1¢ sales tax collected from ultimate consumer .....21¢ per gal.

Gasoline excise tax collected from ultimate consumer:

Federal gasoline excise tax 04¢ per gal.

Miss. gasoline excise tax 07¢ per gal.

Total sum collected by retail service station operation from ultimate consumer for gasoline purchase price, sales tax and excise taxes .....32¢ per gal.

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1. At the time of the filing of the original bill of complaint the applicable law was cited to the then effective Mississippi Code as MISS. CODE ANN., §§ 10103-10139 (1942). The Mississippi Code of 1972 became effective November 1, 1973.

The purchase price of the gasoline of 14 cents paid to the supplier in Arkansas or Tennessee is an approximate and illustrative amount since purchases of both regular and premium gasoline are made and since, of course, the price of gasoline fluctuates frequently on account of the market condition. Obviously, the retail sales price would also vary in accordance with Gurley's cost per gallon. Furthermore, the Mississippi gasoline excise tax increased from 7 cents to 8 cents per gallon on January 2, 1970.[2] The above computation is, however, illustrative of the manner in which Gurley computes the amount of Mississippi sales tax due to the State of Mississippi on the retail sale of gasoline at the retail service stations of Gurley Oil Company in the State of Mississippi. Obviously, the federal and state excise taxes on the sale of gasoline were not included by Gurley in gross proceeds of sale for the purpose of computing the amount of sales tax due to the State of Mississippi [App. 42-45].

As shown in the above computation, the five per cent (5%) Mississippi sales tax on the gross sales price of the gasoline of 20 cents per gallon or 1 cent per gallon is collected from the ultimate consumer by Gurley and is, in turn, remitted to the State of Mississippi in the monthly sales tax returns filed by Gurley. However, no sales tax was collected by Gurley from the ultimate consumer on the federal and state gasoline excise taxes. The State Tax Commissioner made additional assessments against Gurley for such sales taxes which he alleged to be due and Gurley was required to pay such amounts to the Commissioner. Gurley now seeks to recover such amounts paid under protest by him due to his refusal to pay sales tax based upon the inclusion of state and federal excise tax within

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2. The Mississippi gasoline excise tax increased from 8¢ to 9¢ per gallon on July 1, 1973. Though this increase did not occur during the period covered by the case *sub judice*, suit has been filed to recover taxes paid during this later period.

the sales tax base. Gurley bore the burden of the taxes sued for and did not directly or indirectly collect such taxes from the ultimate consumer on any of the retail sales of gasoline made by Gurley in the State of Mississippi [App. 44-45].

B.

Gurley's Method of Collection of Federal Excise Tax from the Ultimate Consumer on the Sale of Gasoline.

26 *U.S.C.*, § 4081, imposes a federal excise tax on the sale of gasoline by the producer thereof in the amount of 4 cents per gallon. As shown in the illustrative computation hereinabove, this 4 cents tax on the retail sale of gasoline is collected by Gurley Oil Company from the ultimate consumer at the time of the retail sale. The amount of federal excise tax collected by Gurley from the ultimate consumer is remitted to a Federal depository on a form bearing the registration number assigned to Gurley Oil Company by the Internal Revenue Service within 3 days after the 1st of each month and within 3 days after the 15th of each month. The amount of monies remitted to the Federal depository is ascertained by calculating the actual gallons sold to the ultimate consumer for the time period involved. No monies or funds are actually remitted to the Federal depository until such funds have been collected from the ultimate consumer on the retail sale of gasoline [App. 46-47].

Federal excise tax on the sale of gasoline is collected by Gurley from the ultimate consumer and is payable by him to the Internal Revenue Service, even though Gurley is a retailer of gasoline and not a manufacturer of gasoline.[3] Gurley's registration number (supplied by the In-

3. 26 *U.S.C.*, § 4082 provides that any person to whom gas is sold tax free is a producer and, consequently, must collect the tax for the United States Government.

ternal Revenue Service) is the same registration number utilized by Gurley in remitting social security withholding taxes on his employees [App. 47]. It should be noted that in remitting the federal excise tax on the sale of diesel fuel, Gurley Oil Company utilizes the same registration number, the same form and remits said funds to the same Federal depository at the same designated times [App. 48-49].[4]

C.

Gurley's Method of Collection of State Excise Tax from the Ultimate Consumer on the Sale of Gasoline.

MISS. CODE ANN., § 10013-06 (1942), which was in effect during part of the contested period, imposed an excise tax on the sale of gasoline in the amount of 7 cents per gallon. On January 2, 1970, MISS. CODE ANN., § 10076-05 (1942) [now MISS. CODE ANN., § 27-55-11 (1972)] became effective, increasing the amount of the excise tax on gasoline to 8 cents per gallon.

The Mississippi excise tax on the sale of gasoline was and is collected by Gurley from the ultimate consumer at the time of the retail sale of the gasoline. The taxes so collected from the ultimate consumer are remitted to the State of Mississippi on or before the 20th day of the succeeding month for sales which were made in the preceding calendar month. In all instances the total amount of the excise taxes remitted to the State of Mississippi on the 20th day of the succeeding month have been collected from the ultimate consumer prior to the remittance. This is true because Gurley never supplies more than a 7-day inventory to his respective retail stations in

4. The federal excise tax on the sale of diesel fuel is not included in the sales tax base by the Mississippi State Tax Commission [App. 45].

Mississippi. Therefore, all inventory placed in the said retail outlets in the latter part of the calendar month would have been sold by the 7th day of the succeeding month and, therefore, the excise taxes on the entire amount of gasoline sold during the preceding month would have been collected at least 13 days prior to the remittance to the State of Mississippi on the 20th day of the month [App. 48-50].

On January 18, 1971, Gurley filed suit to recover sales taxes improperly collected by the State of Mississippi on account of the illegal inclusion by the State Tax Commissioner of the state and federal excise taxes on gasoline within the gross proceeds of the sale for the purpose of computing sales tax liability of Gurley on the retail sales of such gasoline [App. 3]. The State Tax Commission cross-complained for past sales taxes not paid [App. 27]; and the recoverable amounts were stipulated [App. 36-39]. If Gurley won, he was to receive a $62,782.57 refund, and if he lost, his additional liability was determined to be $29,131.19 [App. 36-39]. The State Tax Commission prevailed on all counts and Gurley appealed to the Supreme Court of Mississippi on the grounds that neither state nor federal excise taxes should be subject to the state sales tax. The Mississippi Supreme Court conceded that there were conflicting decisions based upon similar fact situations (fns. 1 and 2 of opinion), but affirmed the lower court's judgment that the federal and state excise taxes were imposed upon the producer or distributor as a privilege tax rather than on the user or consumer as a use tax. Subsequently, judgment was entered for the State Tax Commission [App. 92-93]; a petition for writ of certiorari was filed by Gurley with this Court on May 20, 1974 and granted on November 18, 1974.

SUMMARY OF ARGUMENT

I.

THE IMPOSITION OF A STATE SALES TAX ON A FEDERAL EXCISE TAX VIOLATED PETITIONER'S RIGHT TO EQUAL PROTECTION UNDER THE LAWS, DEPRIVED HIM OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW AND VIOLATED THE FEDERAL GOVERNMENT'S SOVEREIGN IMMUNITY FROM TAXATION.

A.

The Federal Excise Tax on Gasoline Is a Tax upon the Sale, Not the Manufacturer, of Gasoline.

26 *U.S.C.*, § 4081, provides for a federal excise tax on "gasoline sold". The petitioner's business operation is unlike that of most of the major oil companies. Gurley buys gasoline tax free from the manufacturer, and sells it to the ultimate consumer; there is no middleman. Consequently, the federal excise tax cannot possibly attach before Gurley's sale to the ultimate consumer.

This Court has previously ruled that statutes worded similarly to 26 *U.S.C.*, § 4081, imposed taxes upon the sale and not the manufacturer of an item. In *Indian Motocycle Co.* v. *United States*, 283 U.S. 570 (1931), the Court stated that a federal excise tax on motorcycles "sold" was a tax levied upon the sale and not on the manufacturer, producer, or importer of that product. Similarly, in *Panhandle Oil Co.* v. *Miss. ex rel. Knox*, 277 U.S. 218 (1928), the Court, considering a Mississippi excise tax on gasoline "sold", stated that "to use a number of gallons sold . . . as a measure of the privilege tax is in substance and legal

effect to tax the sale." Id. at 222. Though the *Panhandle* decision was later questioned, it was reaffirmed in *Kern-Limerick Inc.* v. *Scurlock*, 347 U.S. 110 (1954).

B.

The Federal Excise Tax Is, Therefore, Not Part of the Sales Price of Gasoline.

Since the federal excise tax on gasoline sold by Gurley is levied upon his sale of the product and attaches upon such sale, it does not come into existence until after the contract of sale has been made and consummated. Therefore, the tax could not possibly be part of the sales price of gasoline sold.

This view has been followed by several state supreme courts in determining that the federal excise tax on gasoline cannot be subject to a state sales tax. In *Standard Oil Co.* v. *State*, 283 Mich. 85, 276 N.W. 908, 912 (1937), the Michigan Supreme Court stated that "such fund does not become a part of the 'gross proceeds' realized by the manufacturer from the sale, and is [therefore] not subject to taxation within the meaning of [the Michigan Sales Tax Act] . . ." A similar decision was reached in *Standard Oil Co. of Indiana* v. *State Tax Commissioner*, 71 N.D. 146, 299 N.W. 447 (1941).

C.

The Federal Excise Tax, Is, by Its Language, Legislative Intent and Judicial Interpretation, upon the Consumer (As a Use Tax), Not the Seller (As a Privilege Tax).

Though the federal excise tax on diesel fuel is specifically exempted from the Mississippi sales tax, the identical tax on gasoline is not. However, if the excise tax is deter-

mined to be upon the consumer and merely collected by Gurley, then, regardless of the interpretation of the Mississippi Sales Tax Act, the excise tax cannot be included within the term "gross proceeds of sale" and, consequently, the excise tax itself cannot be taxed.

1. Legislative Intent.

This view of the federal gasoline tax as a tax levied upon the consumer has been supported by the President and Congress of the United States. In 1965, President Johnson called this particular tax a *user tax*. In that same year, Congress, while amending the excise tax law, specifically stated that the tax was a user tax which taxed the users of highways in proportion to their use of the services.

Additionally, Congress has passed legislation which provides that the producer's (tax collector's) use of the gasoline is taxable as a sale (26 *U.S.C.*, § 4082(c)), but the gas is not taxable at all if it is lost or destroyed [for then it is not used on the highways] (Revenue Ruling 64-211). Congress has also enacted refund provisions which allow the *consumer* a refund for gasoline used for non-highway purposes (26 *U.S.C.*, §§ 6420(a), 6421(a)(b)).

These pronouncements underline what should be evidenced from the federal gasoline tax itself, that the tax is levied on and eventually paid by the consumer and that the retailer or producer collecting it does not collect the tax as part of his consideration, but only as an agent for the taxing authority. Consequently, any interpretation of 26 *U.S.C.*, § 4081, as being a tax upon the retailer or producer himself is contrary to the federal statutory provisions, their legislative history and authoritative commentary.

2. Judicial Decisions.

Admittedly, there is a split of lower court authority as to the inclusion of the federal excise tax in a state sales tax base. The better reasoned decisions state that this tax is on the consumer, and, therefore, is not subject to sales tax. See *Tax Review Board* v. *Esso, Standard Division of Humble Oil & Refining Co.*, 424 Pa. 355, 227 A.2d 657 (1967), *cert. denied* 389 U.S. 824 (1967); *Standard Oil Co.* v. *State*, 283 Mich. 85, 276 N.W. 908 (1937). See also, *Standard Oil Co. of Indiana* v. *State Tax Commissioner*, 71 N.D. 176, 299 N.W. 447 (1941); *Gulf Oil Corp.* v. *McGoldrick*, 9 N.Y.S.2d 544 (1939); *Kesbec, Inc.* v. *Taylor*, 2 N.Y.S.2d 241 (1938); *Socony-Vacuum Oil Company* v. *New York*, 287 N.Y.S. 288 (1936). The above cases are supported by two decisions of this Court. See, *Panhandle Oil Co.* v. *State of Mississippi ex rel. Knox*, 277 U.S. 218 (1928); *Indian Motocycle Co.* v. *United States*, 283 U.S. 570 (1931).

D.

In Collecting the Federal Excise Tax on Gasoline, Gurley Acts As the Agent of the United States for the Purpose of Such Collection.

It is not unusual for a party to collect and remit a tax that is imposed on another, particularly when, as here, the class of taxpayers upon whom the tax is legally imposed is very numerous. *Paisner* v. *O'Connell*, 208 F.Supp. 397 (D.R.I., 1962).

The agency status of Gurley as only a collector for the government of gasoline excise taxes is further substantiated by the following: (a) The collector must register with the Secretary of the Treasury or his delegate (26 *U.S.C.*, § 7232); and (b) The refund provisions (26

U.S.C., §§ 6420, 6421, concerning gasoline used for non-highway purposes) depend only upon the actual use of gasoline by the consumer and provide only for refunds to the ultimate consumer of the gasoline, not to the producer as the collecting agent.

E.

The Imposition of Sales Tax on the Federal Excise Tax on Gasoline Violates Gurley's Due Process and Equal Protection Rights and Results in a Tax upon the Federal Government.

Consequently, to impose the Mississippi sales tax upon amounts so received by Gurley would be to tax him upon gross receipts which are not his gross receipts, but the gross receipts of the United States. This would not only violate the fundamental conception of right and justice, but it would be taking Gurley's property without the due process of law guaranteed him by the Fourteenth Amendment to the Constitution of the United States. Furthermore, since other independent oil dealers in those states which do not include the federal excise tax as a part of the sales tax base would not be forced to pay such tax, then the arbitrary imposition of such tax upon Gurley and those other independent oil dealers in his class (who have to pay a sales tax on federal excise tax) would deprive Gurley of the Fourteenth Amendment's guarantee to equal protection of the laws. *Hoeper* v. *Tax Commissioner*, 284 U.S. 206 (1931).

II.

THE IMPOSITION OF MISSISSIPPI SALES TAX ON MISSISSIPPI GASOLINE EXCISE TAXES COLLECTED AND HELD BY GURLEY RESULTS IN A DEPRIVATION OF THE GASOLINE DEALER'S PROPERTY WITHOUT DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The Mississippi gasoline excise tax, like the federal excise tax on gasoline, is clearly upon the consumer, and the taxing of such funds collected from the consumer-taxpayer and belonging to the State of Mississippi is a clear taking of petitioner's property under the color of state law without the due process afforded under the Constitution of the United States.

A.

The Panhandle Decision.

In 1928, this Court decided the case of *Panhandle Oil Company* v. *Mississippi ex rel. Knox*, 277 U.S. 218 (1928), thereby placing the legal and economic incidence of the Mississippi excise tax upon the consumer (the United States).

In 1941, this Court decided the case of *Alabama* v. *King and Boozer*, 314 U.S. 1 (1941), which explained *Panhandle* by stating that when the economic (not the legal) incidence of a tax fell upon the United States, the tax did not violate the Federal Government's constitutional immunity. *King and Boozer* did nothing to change the *Panhandle* decision that the excise tax was upon the consumer; the later case merely stated that King and Boozer (the contractor) was the consumer and consequently, the United States was not.

In 1954, the Court decided the case of *Kern-Limerick Inc.* v. *Scurlock*, 347 U.S. 110 (1954), which reaffirmed the *Panhandle* decision. That case did not change the *King and Boozer* decision, but merely stated that Kern-Limerick Inc. (the contractor) was the agent for the United States (who was the real purchaser-consumer). Therefore, the tax was upon the United States as a purchaser and, consequently, it was unconstitutional.

Throughout this line of cases, the Court has consistently maintained the doctrine that all of the contested taxes were upon the consumer-user, not the producer-collector, even though the seller or producer was required to report and make payment of the taxes to the state.

B.

Legislative Intent.

An analysis of the pertinent sections of the Mississippi gasoline excise tax indicates that the legislative intent was to impose this tax upon the consumer as a use tax, even though, as pointed out in *Panhandle*, the language of the statute has always contained wording concerning the tax as one on the privilege of engaging in business.

"It is declared to be the purpose and intention of the legislature to impose an excise tax to provide highways, streets and roads . . .", MISS. CODE ANN., § 27-55-3 (1972). This language itself implies that the state excise tax on gasoline is a user tax.

The state refund statutes are also indicative of legislative intent to tax the user, for they provide for refunds to the user of gasoline for nonhighway purposes. MISS. CODE ANN. § 27-55-23 (1972). If the gasoline is lost or destroyed the tax is again refunded. MISS. CODE ANN., § 27-55-27 (1972).

Conclusively, if the tax was in reality one upon the producer for the privilege of doing business, then each producer in the chain of distribution who handled a particular shipment of gasoline would be taxed; however, this is not the case, for MISS. CODE ANN., § 27-55-11 (1972), provides for the tax to be collected and paid only once (regardless of the number of transfers).

Furthermore, in *State* v. *Republic Oil Co.*, 202 Miss. 688, 32 So.2d 290 (1947), the Mississippi Supreme Court decided that the state excise tax on gasoline was upon the consumer.

C.

Judicial Authorities.

The following jurisdictions have determined that the state gasoline excise taxes are not to be included in the state sales tax base. *American Oil Co.* v. *Mahin*, 49 Ill.2d 199, 273 N.E.2d 818 (1971); *State of Georgia* v. *Thoni Oil Magic Benzol Gas Stations, Inc.*, 121 Ga. App. 454, 174 S.E.2d 224 (Ga. App. Ct. 1970), *aff'd*, 226 Ga. 883, 178 S.E.2d 173 (1970); *Kesbec, Inc.* v. *McGoldrick*, 16 N.E.2d 288, 278 N.Y. 293 (1938); *Kesbec, Inc.* v. *Taylor*, 2 N.Y.S.2d 241 (1938).

Consequently, just as the imposition of a state sales tax on the federal excise tax constitutes a violation of Gurley's due process and equal protection rights (Argument I), so too does the imposition of a state sales tax on the state excise tax on gasoline. And, as stated by the Court in *Hoeper* v. *Tax Commissioner*, 284 U.S. 206 (1931);

> ". . . any attempt by a state to measure the tax on one person's property . . . by reference to the property . . . of another is contrary to due process of law as guaranteed by the 14th Amendment." 284 U.S. at 208.

ARGUMENT

I.

THE IMPOSITION OF A STATE SALES TAX ON A FEDERAL EXCISE TAX VIOLATED PETITIONER'S RIGHT TO EQUAL PROTECTION UNDER THE LAWS, DEPRIVED HIM OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW AND VIOLATED THE FEDERAL GOVERNMENT'S SOVEREIGN IMMUNITY FROM TAXATION.[5]

A.

The Federal Excise Tax on Gasoline Is a Tax upon the Sale, Not the Manufacturer, of Gasoline.

26 *U.S.C.*, § 4081, provides as follows:

> "There is hereby imposed on gasoline *sold* by the producer or importer thereof, or by any producer of gasoline, a tax of 4¢ a gallon." [Emphasis added]

26 *U.S.C.*, § 4082, defines a producer within the meaning of the above quoted statute as:

> "(a) *Producer*—As used in this subpart, the term 'producer' includes a refiner, compounder, blender, or wholesale distributor, and a dealer selling gasoline exclusively to producers of gasoline as well as a producer. *Any person to whom gasoline is sold tax free shall be considered a producer of such gasoline.*" [Emphasis added]

In determining the application of the above mentioned sections to the business operations of the petitioner, Gur-

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5. *See*, Northrup, *The Measure of Sales Taxes*, 9 VAND. L. REV. 237 (1956), from which a portion of this argument is drawn.

ley, it is of utmost importance to note that he is one of many small independent oil dealers, who purchases his petroleum products directly from the supplier, or manufacturer and sells directly to the ultimate consumer. Therefore, no federal or state excise tax is charged to or passed on to Gurley Oil Company by a supplier or manufacturer who has already reflected the tax in his sales price. The only charge made by the manufacturer or supplier is the basic price of the gasoline. 26 *U.S.C.*, § 4081, imposes an excise tax on "gasoline sold by the producer". In the instant case, the only sale upon which this tax is imposed is Gurley's sale to the consumer, with Gurley being a producer as defined in 26 *U.S.C.*, § 4082. Therefore, the tax could not possibly attach before that sale.

In the usual major oil company operation, there is the involvement of a sale by the manufacturer or major oil company to a distributor, a sale by that distributor to a retail operator and a sale by that retail operator to the ultimate consumer. In such cases, the major oil companies might render an invoice to the distributor or wholesaler which would contain the basic price of the gasoline plus federal excise tax which would be passed on to the distributor and the distributor would then render an invoice to the retail operator which contains the federal excise tax on the sale of gasoline as a part of the price. Alternatively, the federal excise tax might not appear until the sale from the distributor to the retailer. In any event, however, the federal excise tax is remitted to the Federal Government prior to the sale by the retail service station operator to the ultimate consumer in the case of major oil company operations, which is not the case with the operation of the petitioner and others so situated [A. 52-54]. Thus, the word "sold" in § 4081 can only apply to the sale to the consumer-user and said tax is at that time collected from the buyer who is the taxpayer.

Additionally, this Court has previously ruled that similarly worded statutes imposed taxes upon the sale and not the manufacture of an item. In *Indian Motocycle Co.* v. *United States*, 283 U.S. 570 (1931), the Court considered a federal excise tax on motorcycles which provided:

> "There shall be levied, assessed, collected and paid upon the following articles *sold* or leased by the manufacturer, producer or importer, a tax equivalent to the following percentage of the price for which so sold or leased. Revenue Act of 1924, § 600, 43 Stat. 322." [Emphasis added].

The Supreme Court stated:

> "Both parties rightly regard the tax as an excise, and not a direct tax on the articles named. . . . We think it is laid on the sale, and on that alone. It is levied as of the time of sale and is measured according to the price obtained by the sale. . . . Counsel for the government base their contention on the requirement that the tax be paid by 'the manufacturer, producer, or importer;' but we think this requirement is intended to be no more than a comprehensive and convenient mode of reaching all first or initial sales, and that it does not reflect a purpose to base the tax in any way on manufacture, production or importation." 283 U.S., at 573, 574.

In *Panhandle Oil Co.* v. *Miss. ex rel. Knox*, 277 U.S. 218 (1928), the Supreme Court, in considering the question of the legal incidence of the Mississippi excise tax on gasoline, decided that the tax was upon the sale.[6] The Court stated that:

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6. As discussed in point II of Argument, the Court, in Kern-Limerick Inc. v. Scurlock, 347 U.S. 110 (1954), reaffirmed the *Panhandle* decision.

> ". . . To use the number of gallons sold the United States as a measure of the privilege tax is in substance and legal effect to tax the sale." Id. at 222.

Though the instant case does not involve the question of constitutional immunity as did *Panhandle*, the Court's holding (that taxes similar to the federal excise tax [identical to the Mississippi excise tax] were upon the sale itself) is vitally important to the case at bar. The cases previously cited are precisely in point upon the question presented here.

B.

The Federal Excise Tax Is, Therefore, Not Part of the Sales Price of Gasoline.

Since the federal excise tax on gasoline sold by Gurley is levied upon his sale of the product and attaches upon such sale, it does not come into existence until after the contract of sale has been made and consummated. Then, for the first time, the tax attaches and becomes a liability. The tax therefore, is not a part of Gurley's sales price, which has already been determined. It is an exaction and an addition to and over and above the sales price. Obviously, the sales price of an article cannot include a tax levied upon that very sale. This view has been followed by several state supreme courts in determining that the federal excise tax cannot be subject to state sales tax.

In *Standard Oil Co.* v. *State*, 283 Mich. 85, 276 N.W. 908, 912 (1937), the Michigan Supreme Court said:

> "In view of the fact that the federal excise tax and the state sales tax attach at the instant a sale is made, it follows that the federal tax has not become a part of the sale price, but is a fund, which when

collected is payable by the manufacturer to the federal government. Such fund does not become a part of the 'gross proceeds' realized by the manufacturer from the sale, and is not subject to taxation within the meaning of Act No. 167, Pub. Acts 1933. . . ."

In *Standard Oil Co. of Indiana* v. *State Tax Commissioner*, 71 N.D. 146, 299 N.W. 447, 450 (1941), the North Dakota Court said:

"The instant the sale is made, the Federal Government says, 'This sale is subject to, and there is laid upon it, a tax of 1 cent (now 1-1/2 cents) for each gallon sold', and the State says, 'This sale is subject to, and there is laid upon it, a tax of two percent on the total amount of the sales price "valued in money or otherwise" '. In these circumstances it seems entirely clear that the amount of the Federal excise tax thus collected by the seller from the buyer for payment to the Federal Government of the tax laid by it upon the sale, does not become part of the 'gross receipts' realized by the seller from the sale within the purview of the State Sales Tax Act." [Emphasis added].

C.

The Federal Excise Tax Is, by Its Language, Legislative Intent and Judicial Interpretation, upon the Consumer (As a Use Tax), Not the Seller (As a Privilege Tax).

The Mississippi sales tax statute provides for a tax on gross proceeds of sales, which is defined in § 27-65-3(g), MISS. CODE ANN. (1972), as follows:

"(g) 'Gross proceeds of sales' means the value proceeding or accruing from the full sale price of tangible personal property including installation charges,

carrying charges, or any other addition to the selling price on account of deferred payments by the purchaser, without any deduction for freight, cost of property sold, other expenses or losses, or taxes of any kind except those expressly exempt by section 27-65-29, Mississippi Code of 1972."

The exemptions contained in MISS. CODE ANN. (1972), § 27-65-29, include federal retailer's excise taxes, but make no mention of the federal excise tax on gasoline.

However, if the excise tax is determined to be a tax upon the consumer which attaches at the time of the sale and is merely collected by the retailer, then, regardless of the interpretation of the Mississippi Sales Tax Act, these proceeds cannot be included within the term "gross proceeds of sale." These proceeds would be classified as monies held for the United States Government and not proceeds which are included in the gross revenues of sales of petitioner Gurley.

The language of the statutes involved and the legislative commentary on those enactments compel the conclusion that the federal gasoline tax should not be included in the base on which the Mississippi sales tax is computed. While the cases dealing with this issue are split, the better reasoned decisions lead to the same conclusion.

1. Legislative Intent.

This view of the federal gasoline tax as a tax levied upon the consumer has been supported by both the President and Congress of the United States.[7]

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7. The federal gasoline tax is derived from the Revenue Act of 1932, Act of June 6, 1932, Pub. L. No. 72-154, c. 209, § 617, 47 Stat. 169, 266-67. The refund provisions were enacted by Act of April 2, 1956, Pub. L. No. 84-466, c. 160, § 1, 70 Stat. 87, and Act of June 29, 1956, Pub. L. No. 84-627, c. 462, § 208(c), 70 Stat. 374, 394.

In his message to Congress of May 17, 1965, President Johnson stated that "reform of the excise tax structure will leave . . . excises on alcoholic beverages, tobacco, *gasoline*, tires, trucks, air transportation (and a few *other user-charges* and special excises) . . ." [Emphasis added]. H.R. Doc. #173, 89th Cong., 1st Sess. 3 (1965).

Congress has been more explicit. The House Ways and Means Committee has reported that the excise tax reduction of 1965, Pub.L.No. 89-44, 79 Stat. 136, amending the Internal Revenue Code of 1954, was designed to "leave a tax system in which [certain] . . . of the remaining excise taxes . . . are levied on the benefit principle." "Under this principle," the Committee reported, "those who benefit from particular government services help to pay the cost of the services by paying charges (in the form of excises) which to some extent measure their use services. Included in this category of taxes are those on *gasoline*, tires and tubes, and other revenues allocated to the highway trust fund." [Emphasis added]. H.R. Rep. No. 433, 89th Cong., 1st Sess. 11 (1965). In the same report, the Committee continued:

> "Taxes such as those on gasoline . . . are *user taxes* . . . a tax on gasoline taxes users of the highway in rough proportion to their use of the services." Id., at pps. 14-15. [Emphasis added].

Moreover, Congress specifically provided that when a producer *uses* gasoline produced or imported by him, such use shall be considered a sale, raising tax liability [26 *U.S.C.*, § 4082(c)], thus reinforcing the proposition that the federal gasoline tax is, in reality, a tax on the user. Supporting the same conclusion is Revenue Ruling 64-211, 1964-2 Cum. Bull. 421, in which the Internal Revenue Service ruled that a producer is not liable for the

tax when his consignee loses the gasoline through evaporation or spillage and the gasoline never reaches the ultimate consumer.

Also, of decisive significance is the fact that Congress has provided in certain instances, to refund federal gasoline taxes to the *ultimate consumer* even though they were originally remitted by a producer. For example, the tax on gasoline used on a farm for farming purposes is refunded directly to the consumer of that gasoline [26 *U.S.C.*, § 6420(a)]. Similarly, the tax is refunded to the ultimate consumer at the rate of 50 per cent when the gasoline is used for nonhighway purposes [26 *U.S.C.*, § 6421(a)], or by local transit systems [26 *U.S.C.*, § 6421 (b)]. Even though the tax is collected for the Federal Government by the producer, Congress provided that it should be refunded directly to the consumer in these instances. In light of these refund provisions, if this Court were to rule that the legal incidence of the tax here in question is on the producer, rather than the consumer, it would seem a most serious question as to whether the refund provisions of the federal gasoline tax constitute an unconstitutional use of the taxing power. It is difficult to conceive that such an anomalous result was intended by the Congress.

These pronouncements underline what should be evidenced from the federal gasoline tax itself, that the tax is levied and eventually paid by the consumer and that the retailer collecting it does not collect the tax as part of his consideration, but only as an agent for the taxing authority. Consequently, any interpretation of the federal statutory provisions as being a tax upon the producer or the retailer himself is contrary to federal statutory provisions, their legislative history and authoritative commentary.

2. Judicial Decisions.

As indicated above, there is a split of authority relating to whether the federal excise tax should be included in the base on which a state sales tax should be measured.

In *Standard Oil Co.* v. *State*, 283 Mich. 85, 276 N.W. 908 (1937), the Michigan Supreme Court considered the exact question presented in this case. That court determined that the sales tax levied by the State of Michigan could not include in its tax base federal excise tax collected on the retail sales of gasoline.

In reaching this decision, the court noted that the plaintiff made retail sales as a producer directly to the consumer without any prior sale to any intermediate distributor. The court interpreted the plain language of the federal excise tax statute as indicating that said tax was a tax on the *sale* of gasoline, and given that logical interpretation, made the following statement:

> "In view of the fact that the federal excise tax and the state sales tax attach at the instant a sale is made, it follows that the federal tax has not become a part of the sale price, but is a fund, which when collected is payable by the manufacturer to the federal government. Such fund does not become a part of the 'gross proceeds' realized by the manufacturer from the sale, and is not subject to taxation within the meaning of Act No. 167, Pub. Acts 1933. [The Michigan Sales Tax Act]"

In the case of *Tax Review Board* v. *Esso, Standard Division of Humble Oil & Refining Co.*, 424 Pa. 355, 227 A.2d 657 (1967), *cert. denied* 389 U.S. 824 (1967), the Pennsylvania Supreme Court fully considered the statu-

tory and historical arguments discussed hereinabove. There, the court was faced with the question of whether that portion of the total sales price which Humble charged the purchaser and later remitted to the United States Government in payment of federal gasoline tax was to be considered part of its "gross receipts" for the purpose of measuring the Philadelphia mercantile tax. Reversing the decision of the Department of Collection in the lower court, the Supreme Court of Pennsylvania initially noted that if Humble were a mere collector of the federal gasoline tax, as agent for the United States, such tax receipts collected must be excluded from the computation of taxable gross receipts (227 A.2d at 658). Then, in response to the department's argument that the federal gasoline tax is imposed upon the producer, and not the consumer, the court squarely met the issue presented here, holding that the federal gasoline tax is a user tax, remitted by the producer, but collected from the consumer, upon whom it legally falls. The court stated (227 A.2d at 658-59):

> "* * * However, it is our considered conclusion that the operative word in Section 4081 of the Internal Revenue Code, supra, is *'sold'* and the particular levy is a sales tax pure and simple. Further, the nature, the size of the tax in relation to the wholesale price of the product, and the purpose thereof compel the conclusion, that it is not and never was intended to be imposed upon the producer, but rather upon the purchaser, the user and prime beneficiary of the facilities that the tax pays for and makes possible. The producer's responsibility is limited to seeing that it is paid; hence realistically and logically it is nothing more than a collector thereof.
>
> "The revenue collected as a result of the tax does not go into the general treasury. Instead, it is placed

in a special fund and is used solely to defray the cost of the federal highway system. It was designed to charge the motorists, who use the highways, with the cost thereof. It has been recognized and characterized by both the President and Congress of the United States as 'user tax'. Moreover, this conclusion is fortified by Section 6420(a) of the Code itself, which provides for a refund *to the purchaser* if the gasoline is used on a farm for farm purposes.

"[5] Our ruling is supported by analogous federal court decisions. See, Panhandle Oil Co. v. State of Mississippi ex rel. Knox, 277 U. S. 218, 48 S.Ct. 451, 72 L.Ed. 857 (1928); Indian Motocycle Co. v. United States, 283 U. S. 570, 51 S.Ct. 601, 15 L.Ed. 1277 (1931). . . ." [Emphasis added].

See also, *Standard Oil Co. of Indiana* v. *State Tax Commissioner*, 71 N.D. 176, 299 N.W. 447 (1941); *Gulf Oil Corp.* v. *McGoldrick*, 9 N.Y.S.2d 544 (1939); *Kesbec, Inc.* v. *Taylor*, 2 N.Y.S.2d 241 (1938); *Socony-Vacuum Oil Company* v. *New York*, 287 N.Y.S. 288 (1936).

The reasoning of the above authorities clearly indicates that the federal excise tax must be construed as a use tax upon the consumer and, therefore, should not be included in the state sales tax base.

D.

In Collecting the Federal Excise Tax on Gasoline, Gurley Acts As the Agent of the United States for the Purpose of Such Collection.

It is not unusual for a party to collect and remit a tax that is imposed on another, particularly when, as here,

the class of taxpayers upon whom the tax is legally imposed is very numerous.[8]

In *Paisner* v. *O'Connell*, 208 F.Supp. 397 (D.R.I., 1962), a federal court ruled that the excise taxes on jewelry (26 *U.S.C.*, § 2400) collected by a corporation were trust funds belonging to the United States. "[The corporation] was merely *by law* the agent of the United States for their collection and remittance" (208 F.Supp. at 401).[9]

The agency status of Gurley as only a collector for the government of excise taxes on gasoline is further substantiated by the following: (a) The collector must register with the Secretary of the Treasury or his delegate. 26 *U.S.C.*, § 7232; and (b) the refund provisions (26 *U.S.C.*, §§ 6420, 6421, concerning gasoline used for nonhighway purposes) depend only upon the actual use of gasoline by the consumer and provide only for refunds to the ultimate consumer of the gasoline, not to the producer as the collection agent.

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8. The device of funneling tax remittances through administratively convenient conduits is a common one when the class of taxpayers upon whom the tax is legally imposed is very numerous. Indeed, this Court has characterized the use of a distributor as a tax collector as "a familiar and sanctioned device". General Trading Co. v. State Tax Commission, 322 U.S. 335, 338 (1944). See also Monamotor Oil Co. v. Johnson, 292 U.S. 86, 93 (1934); Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62, 68 (1939).

9. See, in addition, United States v. Washington Toll Bridge Authority, 307 F.2d 330 (9th Cir., 1962) (State bridge authority is under duty to collect and pay over to the United States federal excise taxes imposed on amounts paid for transportation); United States v. First Capital Nat. Bank, 89 F.2d 116 (8th Cir., 1937) (athletic board of state university acted as agent of United States in collection of federal admissions tax and funds so received, though unsegregated, were subject to distraint for taxes); Distinctive Theaters, Inc. v. Looker, 62-1 U.S. Tax Cas., ¶15.400 (S.D. Ohio, 1962) (theatre owner was merely agent of Federal Government for collection of admissions tax imposed by § 1700 of the Internal Revenue Code of 1939).

E.

The Imposition of Sales Tax on the Federal Excise Tax on Gasoline Violates Gurley's Due Process and Equal Protection Rights and Results in a Tax upon the Federal Government.

Consequently, to impose the Mississippi sales tax upon amounts so received by Gurley would be to tax him upon gross receipts which are not his gross receipts, but rather the gross receipts of the United States. This would not only violate the fundamental conception of right and justice, but it would be taking the producer's property without due process of the Fourteenth Amendment to the Constitution of the United States. Furthermore, since other independent oil dealers in those states which do not include the federal excise tax as a part of the sales tax base would not be forced to pay such tax, then the arbitrary imposition of such tax upon Gurley and those other independent oil dealers in his class (who must pay a sales tax on federal excise tax), would deprive Gurley of the Fourteenth Amendment's guarantee to equal protection of the laws.

Hence, in *Hoeper* v. *Tax Commissioner*, 284 U.S. 206 (1931), the United States Supreme Court held that the imposition of a graduated net income tax, under which the separate income of Hoeper's wife was added to his separate income, was invalid. Obviously, Hoeper was taxed on the combined total of the two separate incomes. The necessary effect of this procedure was to collect tax upon the wife's income at a higher bracket rate than the rate which would have applied had her separate income been computed and taxed separately. So far as Hoeper was concerned, it compelled him to pay a tax upon his wife's income as *if it were his own income.*

The Supreme Court, in reversing the lower court, stated:

> "We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person's property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the 14th amendment." 284 U.S. at 208.

The due process and equal protection violations in the instant case are analogous to those in *Hoeper*. Furthermore, the statutory language, legislative intent, and the better reasoned judicial authorities all indicate that the legal incidence of the federal excise tax on gasoline is upon the consumer, not Gurley. Consequently, it is submitted that this Court should reverse the decision of the Mississippi Supreme Court.

II.

THE IMPOSITION OF MISSISSIPPI SALES TAX ON MISSISSIPPI GASOLINE EXCISE TAXES COLLECTED AND HELD BY GURLEY RESULTS IN A DEPRIVATION OF THE GASOLINE DEALER'S PROPERTY WITHOUT DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

The Mississippi gasoline excise tax, like the federal excise tax on gasoline, is clearly upon the consumer, and the taxing of such funds collected from the consumer-taxpayer and belonging to the State of Mississippi is a clear taking of petitioner's property under the color of state law without the due process afforded under the Constitution of the United States.

A.

The Panhandle Decision.

In support of this position, petitioner would state that this Court has previously ruled upon the question of the legal incidence of the Mississippi excise tax. In *Panhandle Oil Company* v. *Mississippi ex rel. Knox*, 277 U.S. 218 (1928), this Court determined that the Mississippi gasoline tax was upon the consumer, not the producer; the Mississippi excise tax law has not been changed in any relevant respect since the rendering of that decision. In the *Panhandle* case, excise tax was sought to be collected for sales of gasoline to the United States for its operations of the U. S. Coast Guard fleet and the Veterans Hospital. The United States claimed that the excise tax was a tax upon the consumer, the United States, not the producer, and, therefore, the tax was unconstitutional under the well-established maxim that a state cannot tax the Federal Government.

The Court decided that both the legal incidence and the economic incidence of the Mississippi state gasoline excise tax was upon the consumer and not the seller and stated:

> "A charge at the prescribed rate is made on account of every gallon acquired by the United States. It is immaterial that the seller and not the purchaser is required to report and make payment to the state. Sale and purchase constitutes a transaction by which the tax is measured and on which the burden rests. The amount of money claimed by the state rises and falls precisely as does the quantity of gasoline so secured by the government. It depends immediately upon the number of gallons. The necessary operation of these enactments when so construed is directly to

> retard, impede and burden the exertion by the United States of its constitutional powers to operate the fleet and hospital. McCullough v. Maryland, 4 Wheat. 316." 277 U.S. at 222.

It should be noted at this point that the original gasoline excise tax law enacted in 1922 (Act of March 25, 1922, Ch. 116 [1922] Gen. Laws Miss. 105) contained the same language in regard to the imposition of the tax as was and is in effect at all times mentioned in the present complaint, as follows:

> "Any person engaged in the business of distributing gasoline, or retail dealer in gasoline, shall pay for the privilege of engaging in such business an excise tax of [1¢ per gallon] upon the sale of gasoline."

Despite this language which has been consistently contained in the Mississippi gasoline excise tax law in all its amended forms, including the amendment effective January 2, 1970, the United States Supreme Court looked to the party upon which the burden of the tax was imposed and determined that the consumer was the "real" taxpayer.

In the case of *Alabama* v. *King and Boozer*, 314 U.S. 1 (1941), this Court ruled that its decision in *Panhandle* was "no longer tenable" so far as it held unconstitutional any tax which placed the *economic* burden upon the Federal Government. However, *King and Boozer* left untouched that part of *Panhandle* and other decisions which state that any tax which places the *legal burden* upon the Federal Government *is* unconstitutional. Neither did *King and Boozer* discuss whether the tax was upon the purchaser or the seller. The court merely stated that the contractor, not the Federal Government, was the purchaser; therefore, the tax was upon the contractor (and, consequently, *not* unconstitutional). Later in the

case of *Kern-Limerick Inc.* v. *Scurlock*, 347 U.S. 110 (1954), the Court reaffirmed the principle established in *Panhandle* and *Indian Motocycle, supra*, and cases of like holding. In the *Kern-Limerick* case, a private contractor who had purchased tractors for use in constructing an ammunition dump for the Navy Department, pursuant to its contract authorizing such purchase and providing that with regard to such transactions the United States should have the status of purchaser, paid under protest the amount of sales tax levied under the Arkansas gross receipts tax law, by which sales to any person were made subject to taxation. In an action by the contractor for refund of the tax, the Supreme Court of Arkansas held that the tax was properly levied. The United States Supreme Court reversed this decision on the ground that the legal incidence of the tax fell upon the United States, as ultimate consumer, and that the purchases were protected from state taxation by the doctrine of sovereign immunity. This case is significant in reaffirming the *Panhandle* doctrine which states that a tax upon the sale itself runs to the consumer.[10]

B.

Legislative Intent.

An analysis of the pertinent sections of the Mississippi gasoline excise tax indicates that the legislative intent was to impose this tax upon the consumer as a use tax, even though, as pointed out in *Panhandle*, the language of the statute has always contained wording concerning the tax as one on the privilege of engaging in business.

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10. In its decision in the instant case, the Mississippi Supreme Court summarily stated that the *Panhandle* case was apparently overruled by *King and Boozer*. 288 So.2d 868, 871 (Miss. 1974).

MISS. CODE ANN., § 27-55-3 (1972), states in part: "It is declared to be the purpose and intention of the legislature to impose an excise tax to provide highways, streets, and roads . . . ." Surely this very language indicates conclusively that the state excise tax on gasoline is a user tax; the purpose is obviously to tax highway users in *direct* proportion to their use of facilities.

This legislative intent is also indicated by the provision for refunds to users of gasoline for nonhighway purposes. MISS. CODE ANN., § 27-55-23 (1972) provides:

> "Any person who shall purchase and use gasoline for agricultural, maritime, industrial, or domestic purposes, as defined in this article, which is not used in operating motor vehicles upon the highways of this state, shall be entitled to a refund of all but one cent per gallon of the tax actually paid on gasoline which is used for agricultural, maritime, industrial, domestic, or nonhighway purposes. . . ."

It is noteworthy that this refund is given *to the user* of the gasoline[11] and not to the collector of the taxes.

MISS. CODE ANN. § 27-55-27 (1972) further strengthens petitioner's argument that the state excise tax falls upon the consumer. The statute provides for a refund for lost or destroyed gasoline. Obviously, the reason for the refund is that the legislature never intended to tax any gasoline, but that expended or used on its highways.

A further look at the Mississippi gasoline excise tax bolsters petitioner's position that the tax is on the consumer and is merely collected by the producer. MISS.

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11. As discussed previously, if the state excise tax is upon the retailer Gurley, then the refunding of Gurley's tax monies to consumers of gasoline for nonhighway purposes raises a serious constitutional question.

CODE ANN. § 27-55-11 (1972) provides for the tax to be collected and paid to the State of Mississippi by the producers or distributors. The use of the term "collected" within the statute is certainly significant in regard to the legal incidence of the tax, for it implies that the distributor is merely an agent for collection of the tax.[12] It should also be noted that this section provides that the tax shall be collected and paid only once regardless of the number of transfers between the actual manufacturer and the consumer. Obviously, if the tax was upon the privilege of doing business, then each seller in the chain from manufacturer to consumer would have to pay the tax. Under the existing scheme, however, multiple taxing of distributors is not provided for as the tax is intended to be on the consumer and to allow a compounding of the tax upon distributor would not be in accord with a levy on the user.

In 1948 the Mississippi Supreme Court, basing its decision on the statutory refund provisions and on the logic espoused in *Panhandle*, held in *State* v. *Republic Oil Co.*, 202 Miss. 688, 32 So.2d 290 (1947), that:

> "The . . . tax is not upon the appellee [a distributor] or other distributors *either at wholesale or retail, but is upon the ultimate consumer; is a use tax for the use of the public highways by the consumer and is not to be collected for uses other than upon the public highways.* The retail dealer in selling to the consumer adds the [seven] cents to that which would otherwise be the price of the gasoline provided the gasoline is to be used on the public highways, and the retailer

12. The agency status of Gurley as a collector of taxes for the state is further evidenced by MISS. CODE ANN. § 27-55-7 (1972) which provides that distributors (collectors of this tax) must register and post pond assuring proper collection and MISS. CODE ANN., § 27-55-13 (1972) which provides that the collector must make monthly reports and remittances to the state of taxes collected.

remits the [seven] cents to the state, which, in turn, reimburses the wholesaler, such as appellee, who has already paid the tax in advance to the state." Id. at 692, 32 So.2d 294[13]. [Emphasis added].

In addition to the provisions already pointed out, which were present in the gasoline excise tax at the time of the *Republic Oil* case, there was from September 1, 1966 until January 1, 1970, the greater portion of the period involved in this refund suit, a provision in the MISS. CODE (Act of June 8, 1966, Ch. 645 (1966) Gen. Laws Miss. 1343) that "the tax levied by this section may be passed on to the ultimate consumer, and such consumer in ascertaining his net income for income tax purposes may deduct any such taxes he has actually paid. . . ."[14]

In summary, the legislative purpose in imposing a state excise tax was to provide for an equitable method to finance highway construction. The legislature accomplished that purpose by taxing the *consumer* in direct proportion to the amount of gasoline he uses on the highways. Therefore, it necessarily follows that the tax, in operation and effect, is imposed on the consumer; Gurley, as a retailer or distributor, merely acts as an agent for the collection of such taxes. Consequently, the excise tax is not on Gurley, but on the user of the gasoline. And, as noted

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13. In its decision in the instant case, the Mississippi Supreme Court dismissed this language as mere dicta. 288 So.2d 868, 872 (Miss. 1974).

14. In ruling that Mississippi gasoline taxes are deductible by the consumer in computing his net income for federal income tax purposes and that the distributor should neither include in his gross income any gasoline tax collected by him nor deduct any amount remitted by him to the state, the chief counsel of the Bureau of Internal Revenue said, "This added language strengthens the conclusion that the tax is intended by the legislature to be imposed upon the ultimate consumer, and the decision in the *Republic Oil* case, *supra*, would apply a fortiori to the new statute." G.C.M. 25579; Cum. Bull. 1948-1, pp. 36, 38.

by the Court in *Panhandle*: "It is immaterial that the seller and not the purchaser is required to report and make payment to the state." 277 U.S. at 222.

C.

Judicial Authorities.

The following jurisdictions have determined that the state gasoline excise taxes are not to be included in the state sales tax base: *American Oil Co.* v. *Mahin*, 49 Ill.2d 199, 273 N.E.2d 818 (1971); *State of Georgia* v. *Thoni Oil Magic Benzol Gas Stations, Inc.*, 121 Ga. App. 454, 174 S.E.2d 224 (Ga. App. Ct. 1970), *aff'd*, 226 Ga. 883, 178 S.E.2d 173 (1970); *Kesbec, Inc.* v. *McGoldrick*, 16 N.E.2d 288, 278 N.Y. 293 (1938); *Kesbec, Inc.* v. *Taylor*, 2 N.Y.S.2d 241 (1938).

In the case of the *State of Georgia* v. *Thoni Oil Magic Benzol Gas Stations, Inc., supra*, the Georgia Supreme Court ruled that its state excise tax was not includable within the gross proceeds upon which the state sales tax was based. The court stated that the Georgia excise tax was a tax upon the ultimate consumer and not upon the seller and that such taxes are "added to the sales price" and, therefore, not includable within the tax base.

In the recent case of *American Oil Co.* v. *Mahin*, 49 Ill.2d 199, 273 N.E.2d 818 (1971), the Illinois Supreme Court held that the case law and aforementioned Illinois statutes supported their conclusion that the legal incidence of the motor fuel tax falls on the consumer of the motor fuel and not upon the distributor or retailer and, thus, that tax monies received by the retailer or distributor pursuant thereto should not be included in the base upon which the retailer's occupation and use taxes are computed. To support the conclusions that the tax was im-

posed upon the consumer and that the retailer or distributor acts only as a collection agent, the court noted the earlier case of *People* v. *Werner*, 364 Ill. 594, 5 N.E.2d 238 (1936), and stated that appellant there contended that he should not be required to pay the retailer's occupation tax on his sales of gasoline because he was paying the motor fuel tax upon the privilege of making the sale, and in deciding that issue the court held that the motor fuel tax was not imposed upon the taxpayer's privilege of selling gasoline and expressly reaffirmed the holding in the case of *People* v. *Kopman*, 358 Ill. 479, 193 N.E. 516 (1934), that the motor fuel tax law "makes the distributor the agent of the state as a collector of the tax."

The case of *American Oil Co.* v. *Mahin*, 49 Ill.2d 199, 273 N.E.2d 818 (1971), indicates that the nature of the state excise tax is that of a tax upon the consumer, which is collected by the seller as agent for the state. This is analogous to petitioner Gurley's position that the seller is the agent of the United States for collection of the federal excise tax on gasoline.

Consequently, just as the imposition of a state sales tax on the federal excise tax consitutes a violation of Gurley's due process and equal protection rights (Argument I), so too does the imposition of a state sales tax on the state gasoline excise tax. As stated by the Court in *Hoeper* v. *Tax Commissioner*, 284 U.S. 206 (1931):

> ". . . any attempt by a state to measure the tax on one person's property . . . by reference to the property . . . of another is contrary to due process of law as guaranteed by the 14th amendment." 284 U.S. at 208.

CONCLUSION

If the federal and state excise taxes attach upon the sale of gasoline, then the tax cannot come into existence until that sale. Since Gurley sells only to the ultimate consumer, the excise tax attaches simultaneously with the sale and with the sales tax; therefore, there can be no sales tax upon the excise tax.

Additionally, if the federal and state excise taxes are upon the consumer as use taxes, then Gurley is merely the collector and not the taxpayer. It is submitted that the *Panhandle* doctrine, which places the legal incidence of the excise tax on gasoline upon the consumer, is still viable and should be applied to the federal excise tax and to all state excise laws. Regardless of the language of each state statute, the fact still remains that the purpose of each tax is to equitably distribute the cost of highway construction to those persons who make use of the highways. No matter how state legislatures disguise the language of the statute, the substance and effect of each state excise tax law is—like the language, substance and effect of the federal statute—to tax the consumer on the sale of gasoline. Consequently, the distributor (Gurley) merely collects the tax for each government and, therefore, he is not the actual payer of the tax.

For the state to exact sales tax from Gurley as if he were the actual payer of either federal or state excise tax is to tax him on property which is not his, but rather that of the state or federal government—which results in the taking of petitioner's property without due process of law, in clear violation of the Fifth and Fourteenth Amendments of the United States Constitution. Furthermore, the discriminatory state taxation of Gurley where others similarly situated are not taxed, deprives the petitioner of equal pro-

tection under the law. Finally, a state tax on those monies held in trust by Gurley as agent for the United States is, in essence, a tax upon the United States itself, and, therefore, is clearly unconstitutional.

For these reasons, the judgment of the Supreme Court of Mississippi should be reversed.

Respectfully submitted,

WALTER P. ARMSTRONG, JR.
HUBERT A. MCBRIDE
19th Floor Commerce Tower
One Commerce Square
Memphis, Tennessee 38103

CHARLES R. DAVIS
THOMAS W. TARDY, III
507 First National Bank Building
Post Office Drawer 1532
Jackson, Mississippi 39205
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Charles R. Davis, one of the counsel for Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 31st day of December, 1974, I served copies of the foregoing Brief for the Petitioner on all parties required to be served, by depositing a copy of said Brief for the Petitioner in the United States Post Office, properly addressed, with first class postage prepaid, to Senator William G. Burgin, Jr. and Mr. Hunter M. Gholson, at Post Office Box 32, Columbus, Mississippi 39701, and to Mr. James H. Haddock, 214 Woolfolk State Office Building, Jackson, Mississippi 39201, Counsel of record for the Respondent.

CHARLES R. DAVIS